In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 976

THE CHOCTAW NATION AND THE CHICKASAW NATION, PETITIONERS

v.

STATE OF OKLAHOMA, ET AL.

No. 1104

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in support of the petitions filed by the Indian tribes in these cases. What is at stake is the ownership of the bed of the navigable portion of the Arkansas River in Oklahoma, claimed by the State as an incident of statehood under the "equal footing" doctrine of *Pollard* v. *Hagan*, 3 How.

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212, and by the Indian tribes as part of prior treaty grants from the United States. The issue has practical importance because the mineral value of the riverbed is substantial and because the decision in this case may well control other similiar controversies. What is more, the ruling below—wholly rejecting the claim of the Indians—implicates solemn promises made by the United States to tribes who have special claims on the government's protection. For these reasons, and because prior decisions of this Court are invoked as dispositive, we believe the case is appropriately brought here.

1. By a series of treaties in the early nineteenth century, the United States ceded very large tracts in what is today Oklahoma to the Choctaw and Chickasaw Nations (jointly) and to the Cherokee Nation. Taken together, these grants include all the lands riparian to the navigable portion of the Arkansas River in Oklahoma, a portion of the river being entirely within the Cherokee reservation, and another segment of the river being the boundary line between the two grants. The Cherokees claim the whole of the riverbed where it is surrounded by their lands, and half of the bed—to the "thread"—where the river is the boundary between themselves and the lands of Choctaws and Chickasaws. These latter tribes—whose grant is earlier—claim the entire bed of the boundary river.[1] These claims are based on treaty provisions—

[1] We express no view on the conflicting claims of the tribes to the south half of the bed of the Arkansas River where it is the boundary between the grants. Neither petition appears to present that dispute for adjudication here, and it seems, at all events, premature, the courts below not having considered it.

notably the Treaty of Dancing Rabbit Creek (September 27, 1830, 7 Stat. 333) in the case of the Choctaw and Chickasaw Nations, and the Treaty of New Echota (December 29, 1835, 7 Stat. 478) in the case of the Cherokees—by which the United States ceded to the tribes "in fee simple" huge tracts described only by exterior boundaries and specifically assuring that the lands would never be embraced within any State or Territory.

Notwithstanding the unqualified language of the grants and the pledge that the lands would never be included in any State, the court of appeals concluded that the United States intended to reserve title to the riverbed circumscribed by the grants, to be held in trust for future States, so that such future States would enter the Union on an "equal footing" with their sister States which acquired ownership of the beds of navigable rivers on statehood. The State of Oklahoma, the court held in reliance on this doctrine, received title to the bed of the Arkansas River when it was admitted to the Union and thus could control the exploitation of subsurface mineral rights.

The court below relied on this Court's decision in *United States* v. *Holt State Bank,* 270 U.S. 49, as standing for the proposition that under the "equal footing" doctrine the lands under navigable rivers were reserved for future States unless the United

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Our submission is merely that the riverbed cannot be supposed to have been reserved to the United States when the lands on either side were granted in perpetuity to Indian tribes. We note that there can be no conflicting claims, as between the tribes, to that portion of the river which is entirely encompassed by the grant to the Cherokee Nation.

States made explicit statements to the contrary in granting surrounding territory. We disagree. If these had been private conveyances, there could be no question that a strip of land underlying a navigable river meandering through the blocks of land granted would be embraced in the grants. This is simply common sense, since such retained strips would be useless and their reservation purposeless. The fact that these were grants by the government, which the court below deemed critical, should not lead to an unnatural and unwarranted restriction on their plain meaning. In the 1830's, when these grants were made, there was certainly no purpose for the United States to retain ownership of such isolated strips through land we promised never to include in any State. See, *e.g., Atlantic and Pacific Railroad* v. *Mingus,* 165 U.S. 413, 435–436.

Nor does the *Holt State Bank* decision, *supra,* justify rejection of this obvious meaning of the grants. Indeed, that case recognized that "equal footing" is not an absolute prohibition against federal conveyance of riverbed lands prior to statehood. It simply held that such disposals "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain" (*id.* at 55). The present cases involve the antithesis of almost every circumstance which was held in *Holt State Bank* to controvert a grant of the lakebed. In that case the government had merely established a reservation for the Indians in return for their cession of their aboriginal right of occupancy of the surrounding lands, while here the United States affirmatively con-

veyed title to the Cherokees, Choctaws, and Chickasaws in fee simple. The grants involved in the present case did not involve (as in *Holt State Bank*) important national and international waterways being used at the time by non-Indian settlers and travelers. The treaties in these cases concerned rivers wholly within the blocks granted, and one of the principal purposes of the outright grants to the tribes was to exclude white men from the use of the area, including the rivers.[2] And in *Holt State Bank,* the pertinent treaties were entered into barely three years before the admission of Minnesota to the Union, whereas the treaties in the present cases pledged that the granted lands would never be included within any State. In light of these critical differences, we believe the 1830 and 1835 treaties sufficiently manifested the government's intention to transfer title to the riverbed, not to retain it in trust for a hypothetical State that at the time the parties believed would never come into existence.[3]

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[2] Although the treaties specifically adverted to Congressional regulation of commerce with the Indians and travel through their territory by white citizens, permission from the tribes was apparently contemplated as a pre-condition to such travel or residence in the area by non-Indians. See, *e.g.*, Arts. 5 and 6, Treaty of New Echota, December 29, 1835 (Cherokee Pet. App. D-7—D-8).

[3] Compare *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 86, where the Court held that adjacent underwater lands were reserved under a statute setting apart "the body of lands known as Annette Island" as an Indian reservation. In *Moore* v. *United States*, 157 F. 2d 760, certiorari denied, 330 U.S. 827, the Ninth Circuit followed this Court's approach and held that an Executive Order reserving lands for the Quileute Indians by government survey lot and section descriptions included adjoining underwater lands. We think these cases express the rule that should be followed and that the present decision cannot be reconciled with them.

2. In our view, the issue presented is sufficiently important to merit final resolution by this Court. Directly involved are substantial interests of the petitioner tribes. In addition, as the court of appeals itself recognized, similar provisions are to be found in treaties with other Indian tribes (Cherokee Pet. App. A–6, n. 11). While the extent to which this similarity will lead to litigation cannot be predicted with any certainty, we believe the present cases pose an appropriate opportunity for the Court to determine the degree of specificity required to make a showing that the government intended to transfer riverbeds to Indians rather than to reserve them in trust for a State whose potential creation was disavowed. Lastly, we point out, the impact of the "implied trust"—"equal footing" doctrine also extends to problems arising from Alaskan Statehood,[4] and a decision by this Court

[4] *E.g.*, the United States withdrew two million acres of land and water in Alaska to form the Kenai Moose Range for the protection of the wildlife in that area. See *Udall* v. *Tallman*, 380 U.S. 1. A district court has nevertheless held that under the "equal footing" doctrine Alaska received title to the lands under navigable waters within the Range when it became a State. *United States* v. *State of Alaska et al.* (Civ. No. A–152–67, D. Alaska). The United States has noted an appeal to the Ninth Circuit.

in the instant cases could measurably advance resolution of such conflicting claims.

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted.

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